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No. 93-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD B. NELLIS *et al.*,

Petitioners,

—v.—

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 2

Statement of Facts 2

Course of Proceedings 8

ARGUMENT 9

I. THE DISTRICT COURT'S FAIR REPRESENTATION DECISION APPLIES THE PROPER LEGAL STANDARD AND CREATES NO CIRCUIT CONFLICT 9

II. THE DISTRICT COURT'S PREEMPTION DECISION PROPERLY CONSTRUES THE DUTY OF FAIR REPRESENTATION AND CREATES NO CIRCUIT CONFLICT 15

CONCLUSION 21

TABLE OF AUTHORITIES

Cases	Page
Ackley v. *Local Union 337, Int'l Bhd. of Teamsters*, 910 F.2d 1295 (6th Cir. 1990)	12
Adcox v. *Teldyne, Inc.*, 1994 U.S.App. Lexis 7811 (6th Cir. 1994)	12
Air Line Pilots Ass'n, Int'l v. *O'Neill*, 499 U.S. 65 (1991)	passim
Air Wisconsin Pilots Protection Comm. v. *Sanderson*, 909 F.2d 213 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991)	20
Allen v. *United Transp. Union*, 964 F.2d 818 (8th Cir. 1992)	12
Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985)	17, 18
Barton Brands, Ltd. v. *NLRB*, 529 F.2d 793 (7th Cir. 1976)	13
Baylis v. *Marriot Corp.*, 843 F.2d 658 (2d Cir. 1988)	18
Bernard v. *Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th Cir. 1989)	13
Carter v. *United Food & Commercial Workers*, 963 F.2d 1078 (8th Cir. 1992)	13
Chaparro-Febus v. *International Longshoremen's Ass'n*, 983 F.2d 325 (1st Cir. 1992)	12
Clarke v. *Laborers' Int'l Union*, 916 F.2d 1539 (11th Cir. 1990)	20
DelCostello v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983)	15

TABLE OF AUTHORITIES

Cases — Page

Eisenberg v. *Trans World Airlines, Inc.*,
654 F.Supp. 125 (S.D. Fla. 1987),
aff'd, 875 F.2d 872 (11th Cir. 1989) 18

Ford Motor Co. v. *Huffman*,
345 U.S. 330 (1953) 9, 11

Griffin v. *Air Line Pilots Ass'n, Int'l*,
126 Lab. Cas. (CCH) ¶10,913 (N.D. Ill. 1993) 17

Gvozdenovic v. *United Air Lines, Inc.*,
933 F.2d 1100 (2d Cir.), *cert. denied*,
112 S.Ct. 305 (1991) 12

Humphrey v. *Moore*, 375 U.S. 335 (1964) 10, 11, 14

In re Glass Workers, Local No. 173,
983 F.2d 725 (6th Cir. 1993) 17

International Bhd. of Elec. Workers v. *Foust*,
442 U.S. 42 (1979) 15

International Bhd. of Elec. Workers v. *Hechler*,
481 U.S. 851 (1987) 19

Johnson v. *United Food & Commercial Workers*,
828 F.2d 961 (3d Cir. 1987) 17

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 16

Jones v. *Trans World Airlines, Inc.*,
495 F.2d 790 (2d Cir. 1974) 13

Metropolitan Life Ins. Co. v. *Massachusetts*,
471 U.S. 724 (1985) 16

Mock v. *T.G.&Y. Stores Co.*,
971 F.2d 522 (10th Cir. 1992) 12

Motor Coach Employees v. Lockridge,
403 U.S. 274 (1971) 14, 17

TABLE OF AUTHORITIES

Cases	Page
NLRB v. *International Longshoremen's Ass'n, Local No. 1581*, 489 F.2d 635 (5th Cir.), *cert. denied*, 419 U.S. 1040 (1974)	13
O'Neill v. *Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199 (5th Cir. 1991)	12, 14
Peterson v. *Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985)	17, 18
Peterson v. *Kennedy*, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986)	17
Rakestraw v. *United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 175 (1993)	10, 12, 13
Rakestraw v. *United Airlines, Inc.*, 765 F.Supp. 474 (N.D. Ill. 1991), *aff'd in rel. part*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 286 (1993)	17
Reiss v. *Brotherhood of Ry. and Airline Clerks*, 629 F.Supp. 1029 (E.D. Pa. 1986)	18
Richardson v. *United Steelworkers of Am.*, 864 F.2d 1162 (5th Cir.), *cert. denied*, 493 U.S. 803 (1989)	17, 18, 20
Steele v. *Louisville & N.R.R.*, 323 U.S. 192 (1944)	11, 13, 15
Swatts v. *United Steelworkers of Am.*, 808 F.2d 1221 (7th Cir. 1986)	14
United Steelworkers of Am. v. *Rawson*, 495 U.S. 362 (1990)	passim
Vaca v. *Sipes*, 386 U.S. 171 (1967)	10, 15

TABLE OF AUTHORITIES

Statutes	Page
29 U.S.C. §185	19, 20
45 U.S.C. §151 *et seq.*	2
45 U.S.C. §152, Ninth	16
45 U.S.C. §156	3

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RESPONDENT'S BRIEF IN OPPOSITION

This case concerns an internal union dispute between petitioners, former local union officials and pilot leaders of a 1989 strike at Eastern Air Lines, Inc. ("Eastern"), and respondent Air Line Pilots Association, International ("ALPA"), their national union, over ALPA's efforts to accommodate the competing interests of the various pilot groups ALPA represents in collective bargaining.

Eastern sold assets to four ALPA-represented airlines during and after petitioners' 1989 strike. Pursuant to an internal union policy, ALPA requested those airlines to hire Eastern pilots with special pay rates and lateral seniority rights (at the expense of the pilots employed at those airlines) and directed the ALPA councils at those airlines to consider reopening pilot collective bargaining agreements in support of ALPA's request. When the managements of those airlines refused to hire petitioners with lateral seniority, ALPA deter-

mined not to direct other ALPA pilot groups to engage in illegal job actions or offer wage concessions in an attempt to force their airlines to hire Eastern pilots with special pay and seniority rights. Petitioners now claim that ALPA somehow "promised" Eastern pilots jobs with seniority at other airlines at any cost and that federal or state law *required* ALPA to sacrifice the interests of other ALPA pilot groups and jeopardize the entire union for their benefit.

This Court has long held that federal labor law charges the union – not the federal courts – with the task of reconciling the conflicting interests of the employees it represents in collective bargaining. The district court in this case thus determined that petitioners failed to establish that ALPA violated its duty of fair representation under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, under the standard recently reaffirmed in *Air Line Pilots Ass'n, Int'l* v. *O'Neill*, 499 U.S. 65 (1991), and that petitioners could not circumvent the federal fair representation doctrine by challenging ALPA's collective bargaining conduct under state law. The district court also found no evidence that ALPA made (or broke) any "promises" to petitioners or failed to follow any union policy. The United States Court of Appeals for the Fourth Circuit affirmed but issued no independent appellate opinion.

We show below that the district court's opinions in this case raise no issue concerning the administration of the duty of fair representation, are fully consistent with a uniform body of preemption case law among the lower courts, and present no question that warrants plenary review by this Court.

COUNTERSTATEMENT OF THE CASE

Statement of Facts

1. Defendant ALPA is a unitary, national labor organization that represents airline pilots at over thirty airlines. ALPA national acts as an umbrella organization that supports

ALPA Master Executive Councils ("MECs") at each ALPA airline; the MECs, in turn, function as the ALPA coordinating councils responsible for representing pilots at each airline. Petitioners are former Eastern MEC officials and pilots who led the Eastern MEC's strike effort in 1989. (App. 7a).

Petitioners' claims center on an internal ALPA collective bargaining policy known as "Fragmentation Policy" that addresses the conflicting interests of pilot groups within ALPA when one ALPA carrier (the "Acquiring Airline") acquires substantial airline operations from another (the "Donor Airline") without hiring pilots from the Donor Airline. The policy outlines "appropriate [ALPA] actions necessary to protect the affected pilots," including (1) requests to the Acquiring Airline and appropriate government agencies to provide for the employment of pilots from the Donor Airline, (2) enforcement of existing contract provisions that would require the Acquiring Airlines to hire Donor Airline pilots with lateral seniority, and (3) assistance to affected MEC's in considering formal contract negotiations under Section 6 of the RLA, 45 U.S.C. §156, to request the employment of Donor Airline pilots with lateral seniority. (App. 9a-11a). ALPA maintains this policy as a procedural framework that allows MECs to advocate the interests of their pilot groups within ALPA and that guides ALPA in its effort to accommodate those competing pilot interests in collective bargaining.

As the district court explained, the policy is thus entirely dependent on the willingness of Acquiring Airlines to hire pilots with lateral seniority, requires internal ALPA negotiations between the affected ALPA MECs, and preserves ALPA's discretion to make the final determination concerning "appropriate" ALPA collective bargaining conduct to seek the lateral transfer of pilots from one ALPA airline to another. (App. 10a-11a). Contrary to the Petition (Pet. 14), moreover, the policy is *not* contained in ALPA's Constitution and By-

Laws or any contract (J.A. 738-39)[1] and is explicitly subject to interpretation, clarification or amendment at any time by ALPA's governing bodies. (App. 27a & n.10). The policy has never been applied to force an airline to employ pilots with lateral seniority.

2. In early March of 1989, without considering Fragmentation Policy, petitioners and the Eastern MEC voted to commence a pilot sympathy strike at Eastern. Although the strike enjoyed substantial initial success,[2] Eastern eventually hired sufficient permanent replacements to continue operations, and the Eastern MEC abandoned the strike in November 1989. Eastern had only recalled a few striking Eastern pilots by the time it terminated operations in January of 1991.

Following the disastrous end to their strike, petitioners began to complain that ALPA had "promised" all Eastern pilots that they would receive jobs with lateral seniority and pay raises under ALPA Fragmentation Policy at each ALPA carrier that acquired Eastern assets (and thus displace incumbent ALPA pilots at those airlines). Although the Petition repeats this rhetoric over and over, petitioners have only

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[1]Citations to "J.A. ___" are to the Joint Appendix on appeal before the Fourth Circuit.

[2]ALPA, the ALPA MECs and ALPA members at other carriers provided extraordinary support to Eastern pilots throughout the strike, including more than $106 million in strike benefits and other financial support largely financed by assessments on individual ALPA pilots. (J.A. 279-80, 846-47). As a substantial part of its efforts under Fragmentation Policy, ALPA also adopted a highly successful first-right-of-hire program that secured jobs for over 1000 Eastern pilots at other ALPA carriers. (App. 40a; J.A. 1086-1014). Those new-hire jobs provided former Eastern pilots with job security and salaries far in excess of their salaries at Eastern.

identified eight statements out of more than a thousand ALPA strike communications in 1989 that even mention Fragmentation Policy. (App. 12a-13a) (listing the statements). As the district court explained, these statements merely "indicate[]" that the procedural framework of ALPA Fragmentation Policy would apply "to the situation at Eastern" (App. 42a & n.15) and do not remotely "promise" wage increases and lifetime job security for striking Eastern pilots through jobs with lateral seniority at other airlines. To the contrary, each statement expressly cautions that the policy was "subject to negotiation between Eastern pilots and the pilots and management of an acquiring carrier" or refers to the policy itself which is entirely dependent on the willingness of Acquiring Airlines to hire pilots with lateral seniority. (App. 12a-13a).

3. The district court also found that ALPA fully complied with Fragmentation Policy in connection with each sale of Eastern assets to other ALPA carriers. (App. 36a, 41a).

In 1989 and 1991, Eastern transferred aircraft to Pan American World Airways, Inc. ("Pan Am"), Midway Airlines, Inc. ("Midway"), Delta Air Lines, Inc. ("Delta"), and two short routes to USAir, Inc. ("USAir") without requiring any airline to employ Eastern pilots with lateral seniority. (App. 8a-9a). In each instance, ALPA requested the Acquiring Airline to hire Eastern pilots with lateral seniority and convened internal union proceedings before ALPA's national governing bodies concerning the application of Fragmentation Policy. As contemplated by the policy, both the petitioners and the ALPA MECs at the Acquiring Airlines participated in those internal union proceedings as vigorous advocates for their own pilot groups. Many, but not all, of the affected ALPA MECs argued that Fragmentation Policy should not apply since the Eastern asset sales (as opposed to the strike) had not caused Eastern pilots to lose any jobs and had not increased pilot staffing needs at the Acquiring Airlines. (App.

15a-16a). In a series of internal proceedings over a two-year period, ALPA's governing bodies interpreted the requirements of ALPA's Fragmentation Policy[3] and directed the affected MECs to implement the policy as interpreted.

Both ALPA and the ALPA MECs, in turn, fully exhausted each of the three steps required under the policy. (App. 41a). At the national level, ALPA repeatedly requested the managements of Pan Am, Midway, Delta and USAir to hire Eastern pilots with lateral seniority. Each carrier refused, explaining that they had purchased Eastern assets without any obligation to hire pilots, that they did not need additional pilots to staff the acquired assets, and/or that they were not willing to bear the substantial costs of retraining Eastern pilots and adding expensive senior pilots to their payroll. (App. 14a-16a). The ALPA MECs also reported that their respective collective bargaining agreements did not require management to accept the lateral transfer of Eastern pilots and that, after careful consideration, they had concluded that re-opening their contracts to seek lateral transfer through Section 6 negotiations would be futile, would require their pilot groups to take a substantial wage cut to alter management's refusal to hire

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[3]In December of 1989, after considering the views of the Eastern MEC and all other ALPA pilot groups, ALPA's governing bodies interpreted the operative paragraph of the policy (App. 9a-10a) to require ALPA and/or the relevant MECs to take three actions: (1) to request Acquiring Airlines to hire Eastern pilots with lateral seniority, (2) to enforce any contract provisions requiring the Acquiring Airlines to do so, and (3) to *consider* re-opening their contracts through formal Section 6 negotiations under the RLA to seek pilot transfer. This interpretation also confirmed that ALPA maintained discretion to take further actions once these steps were exhausted. (App. 10a-11a). Contrary to the Petition (Pet. 5), the district court found that ALPA acted properly and reasonably in issuing this interpretation of its own union policy. (App. 38a).

petitioners, and could place their own pilots at risk of a strike or carrier self-help. (J.A. 683-86, 1755-59).[4]

In response, petitioners demanded that ALPA disregard the interests of ALPA pilots employed at the Acquiring Airlines and direct the other MECs to take actions beyond the requirements of Fragmentation Policy – such as offering pay cuts or engaging in slowdowns, sickouts, intermittent strikes, or other self-help tactics – to disrupt operations at all airlines acquiring Eastern assets until they agreed to hire Eastern pilots with lateral seniority. (App. 39a). Following further proceedings involving the full participation of the Eastern pilots, ALPA's governing bodies determined that ALPA and the MECs had complied with union policy and, after weighing the costs and benefits to all affected pilot groups, declined petitioners' request to order other ALPA pilot groups to risk discipline or discharge by engaging in union pressure tactics or to offer wage cuts in a likely futile effort to force their airlines to hire petitioners with lateral seniority. (App. 21a, 39a).

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[4]Contrary to the Petition (Pet. 2, 4-5), the district court found no evidence that *ALPA* (as opposed to individual pilots at other airlines) "objected" to the transfer of Eastern's pilots with lateral seniority at other carriers. (App. 24a n.9). For example, petitioners have simply made up their claim that Delta and the Delta MEC reached a "private agreement" to refuse to hire Eastern pilots. (Pet. 5). While a Delta official learned that the Delta MEC opposed the application of Fragmentation Policy in *internal* ALPA proceedings, the official testified without contradiction that he knew that such statements did not reflect *ALPA's* position, that he later learned that ALPA had rejected the Delta MEC's position, and that any statements by Delta MEC officers played no role whatsoever in Delta's refusal to hire *any* Eastern pilots under *any* circumstances. Pan Am's initial interest in hiring Eastern pilots (Pet. 4) was likewise based on impossible conditions and was withdrawn while ALPA conducted internal union proceedings pursuant to the policy.

Course of Proceedings

Petitioners allege that ALPA breached its duty of fair representation under the RLA by failing to "implement" Fragmentation Policy to secure jobs with lateral seniority for Eastern pilots at Pan Am, Midway, Delta and USAir through collective bargaining and that ALPA's collective bargaining conduct during and after the Eastern strike violated a variety of state law contract and tort obligations.

In a pretrial ruling, the district court held that petitioners could not circumvent the limited federal duty of fair representation doctrine or force ALPA to disregard the interests of other ALPA pilot groups by challenging ALPA's collective bargaining decisions under state law. (App. 59a). In doing so, the district court followed a uniform body of lower court cases holding that the federal duty of fair representation preempts state law challenges to a union's collective bargaining conduct and carefully distinguished this Court's decision in *United Steelworkers of Am.* v. *Rawson*, 495 U.S. 362 (1990), which did not involve the relationship of *state law* to the federal duty of fair representation and did not involve a challenge to a union's negotiating judgment. (App. 56a-57a).

At the close of discovery, the district court held that ALPA's collective bargaining conduct in this dispute was not arbitrary, discriminatory or undertaken in bad faith under the tripartite duty of fair representation standard recently reaffirmed in *O'Neill*. In particular, the district court held that ALPA's collective bargaining decisions were not "arbitrary" since they were based on a rational consideration of the competing interests of various ALPA pilot groups and a considered interpretation of union policies (App. 21a-22a); that ALPA did not "discriminate" against the petitioners in exhausting Fragmentation Policy simply because the result of ALPA's bargaining decisions may have been to favor the interests of other ALPA pilots over those of petitioners (App.

41a-42a); and that the substantial discovery record compiled below contained no evidence that ALPA had engaged in any "bad faith" – *i.e.*, deceitful or dishonest – conduct in making statements concerning Fragmentation Policy or in interpreting or applying the policy following the strike. (App. 22a-24a).

On appeal, the Fourth Circuit affirmed both decisions "for the reasons set forth by the district court" (App. 5a), but it issued no appellate opinion concerning either the application of the *O'Neill* standard to this case or the preemption of state law claims by the RLA's duty of fair representation.

ARGUMENT

The petition offers two principal reasons for granting plenary review of these intensely fact-bound decisions: (1) that the district court's opinion creates a "conflict" with this Court and other Circuits concerning the application of the duty of fair representation doctrine (Pet. 14-20), and (2) that the district court improperly dismissed petitioners' state law claims (Pet. 9-13). In fact, the decisions below constitute routine applications of federal labor law principles and are fully consistent with the uniform application of the duty of fair representation doctrine by this Court and the lower courts.

I. THE DISTRICT COURT'S FAIR REPRESENTATION DECISION APPLIES THE PROPER LEGAL STANDARD AND CREATES NO CIRCUIT CONFLICT

The system of collective bargaining created by the federal labor statutes requires unions to pursue *collective* interests in labor contracts that often benefit one employee group at the expense of another. *See Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-38 (1953). As "a purposefully limited check" on this legislative enterprise, *see Rawson*, 495 U.S. at 374, this Court has crafted the duty of fair representation to prohibit a union from engaging in arbitrary, discriminatory or bad faith conduct in its role as collective bargaining represen-

tative. *See Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964). In *O'Neill*, the Court recently clarified that this tripartite standard "applies to all union activities, including contract negotiation," *O'Neill*, 499 U.S. at 67, but cautioned that "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities," *id.* at 78.

The district court plainly applied this fair representation standard to the record below and made specific determinations with respect to each element of the tripartite *O'Neill* standard. (App. 21a-22a (arbitrary); 27a, 36a-42a (discrimination); 22a-24a (bad faith)). In doing so, moreover, the court neither ignored *O'Neill* to "follow" the Seventh Circuit's 1992 decision in *Rakestraw* v. *United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 175 (1993),[5] nor adopted any "majority rule" defense to discrimination claims in a fair representation action. (Pet. 14-15).

Although petitioners received nationwide pilot support to mount their strike and nearly 1000 pilot jobs at other carriers through ALPA's efforts, *see supra* n.2, they now fault ALPA for considering and, they say, favoring the interests of other ALPA pilot groups in declining to require other MECs to engage in concessionary collective bargaining or self-help tactics to pursue the lateral transfer of Eastern pilots. Once the Acquiring Airlines refused ALPA's requests under Fragmentation Policy, however, ALPA determined that such conduct would put ALPA pilots at risk of discipline or discharge or require other pilots to sacrifice pay and working

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[5]The Petition fails to disclose that this Court denied the petition for certiorari in the *Rakestraw* case. *See* 114 S.Ct. 175 (1993).

conditions in a likely futile effort to force the Acquiring Airlines to hire petitioners with lateral seniority and premium pay. The district court found that ALPA did not depart from ALPA policy in reaching this decision (App. 41a-42a), and it is undisputed that ALPA has never treated any other pilot group differently under Fragmentation Policy.

Under these circumstances, the district court held that ALPA rationally and properly accommodated the competing interests of ALPA pilot groups and did not unlawfully "discriminate" against petitioners simply because the *result* of ALPA's collective bargaining judgment was to favor the legitimate interests of other ALPA pilots over those of the petitioners. (App. 41a-42a).

This holding is firmly rooted in the fair representation decisions of this Court and every lower court to address the issue. "Conflict between employees represented by the same union is a recurring fact," and federal collective bargaining law *requires* unions to accommodate the often sharply competing interests of the various subgroups of employees the union represents. *See Humphrey*, 375 U.S. at 349-50; *Huffman*, 345 U.S. at 337-38. In matters such as this one involving competing job rights or competing claims to compensation, for example, *every* union decision will benefit one group of employees directly at the expense of another, and *every* such decision will create a dissatisfied group. *See Huffman*, 345 U.S. at 338-39. Because labor unions must broker these conflicting interests through the exercise of essentially legislative judgment, *see Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 202 (1944), unions are entitled to exercise a "wide range of reasonableness" in making such judgments, and collective bargaining decisions are accorded the broad judicial deference accorded legislatures, *see O'Neill*, 499 U.S. at 76; *Humphrey*, 375 U.S. at 349-50.

As a result, even if a union might violate its duty of fair representation by sacrificing "minority interests *solely* to benefit the majority" (Pet. 16) (emphasis added), the Circuits have uniformly held that a union does not unlawfully "discriminate" where, as here, its decision to favor the interests of a majority employee group in resolving competing seniority claims is based on rational and legitimate unions concerns (or the reasonable implementation of union policy). *See Adcox* v. *Teldyne, Inc.*, 1994 U.S.App. Lexis 7811 *18 (6th Cir. 1994) (union absolved of liability because it "followed its rules"); *Chaparro-Febus* v. *International Longshoremen's Ass'n*, 983 F.2d 325, 330-31 (1st Cir. 1992) (upholding a union decision favoring the interests of a majority group in reconciling competing seniority claims); *Rakestraw*, 981 F.2d at 1533 ("[a]dhering to [ALPA] policy insulates the union against . . . the duty of fair representation"); *id.* at 1530-31 (explaining that all union decisions have winners and losers and that a union does not discriminate simply by favoring the majority); *Mock* v. *T.G.&Y. Stores Co.*, 971 F.2d 522, 531 (10th Cir. 1992) ("[s]imply showing that the Union did not represent [plaintiffs] as vigorously as it could have does not establish" a breach of the duty of fair representation); *Allen* v. *United Transp. Union*, 964 F.2d 818, 820 (8th Cir. 1992) ("it is not enough to show the [contract] adversely affected the appellants compared to other employees"); *O'Neill* v. *Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1201-07 (5th Cir. 1991) (dismissing all remaining claims on remand from this Court); *Ackley* v. *Local Union 337, Int'l Bhd. of Teamsters*, 910 F.2d 1295, 1308 (6th Cir. 1990) (explaining that unions would be driven "out of existence" if the duty of fair representation precluded union decisions that favored the interests of some employees over others) (dissenting opinion adopted on rehearing in light of *O'Neill*, *see* 948 F.2d 267 (6th Cir. 1991)); *Gvozdenovic* v. *United Air Lines, Inc.*, 933 F.2d 1100, 1106-07 (2d Cir.), *cert.*

denied, 112 S.Ct. 305 (1991).[6]

Given this consistent application of the fair representation doctrine in the lower courts, petitioners cannot plausibly assert that the district court's decision creates any "conflict" with the handful of pre-*O'Neill* decisions from the First, Second, Seventh and Ninth Circuits cited in the Petition. (Pet. 16-18). In *Bernard* v. *Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th Cir. 1989), and *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974), the union barred a minority employee faction from *any* participation in internal union seniority integration proceedings and established seniority rights *solely* on the basis of union membership. Here, the Eastern MEC and its lawyers enjoyed full participation in all internal Fragmentation Policy proceedings before ALPA's governing bodies. (App. 36a-42a). *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976), suggests that seniority adjustments "may not be made *solely* for the benefit of a stronger, more politically favored group over a minority group," *id.* at 798-99, but plainly held that a union is "absolved of liability" under the duty of fair representation where, as here, it can "show some objective justification for its conduct," *id.* at 800; *see Rakestraw*, 981 F.2d at 1535 (distinguishing *Barton*

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[6]Instead, a union engages in unlawful "discrimination" if it distinguishes between employee groups or intentionally harms a protected class for "invidious" reasons such as race or internal union politics that are unrelated to any legitimate union objective under federal labor law. *See Steele*, 323 U.S. at 203 (race); *Carter* v. *United Food & Commercial Workers*, 963 F.2d 1078, 1081 (8th Cir. 1992) (gender); *NLRB* v. *International Longshoremen's Ass'n, Local No. 1581*, 489 F.2d 635, 636 (5th Cir.) (national origin), *cert. denied*, 419 U.S. 1040 (1974); *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974) (union membership); *Barton Brands, Ltd.* v. *NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (political favoritism).

Brands in the Seventh Circuit). None of these cases remotely stands for the proposition that a union violates the duty every time it favors the majority employee interests in collective bargaining. *Cf. Humphrey*, 375 U.S. at 349 (upholding a union's decision to favor the majority over the minority in determining seniority rights).[7]

The district court's unremarkable application of *O'Neill* and its progeny thus creates no conflict among the Circuits and provides no basis for this Court's review.

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[7]Even further afield is petitioners' passing claim that ALPA engaged in "arbitrary" or "bad faith" conduct. (Pet. 18-19 n.7). First, as the district court explained (App. 21a-22a), ALPA's judgment not to sacrifice the pay and working conditions of other pilot groups for petitioners' benefit was plainly *not* "so far outside a 'wide range of reasonableness' that it is 'wholly irrational.'" *O'Neill*, 499 U.S. at 78 (quoting *Huffman*, 345 U.S. at 338). Second, a showing of bad faith under the duty of fair representation requires "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey*, 375 U.S. at 348; *see also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299-301 (1971). The district court thus properly required proof that ALPA's statements concerning Fragmentation Policy during the strike were intentionally misleading (App. 22a-24a) (collecting cases) and concluded that "nothing in this record supports an inference that ALPA undertook a commitment to the Eastern pilots that it did not intend to honor." (App. 23a). The lower courts have consistently required such proof to challenge statements by union officials under the duty of fair representation, *see, e.g.*, *O'Neill*, 939 F.2d at 1202-03; *Swatts* v. *United Steelworkers of Am.*, 808 F.2d 1221, 1225 (7th Cir. 1986), and no court has ever held that strike statements by union officials are otherwise actionable.

II. THE DISTRICT COURT'S PREEMPTION DECISION PROPERLY CONSTRUES THE DUTY OF FAIR REPRESENTATION AND CREATES NO CIRCUIT CONFLICT

The preemption decision below is equally unexceptional.

A union's authority to engage in collective bargaining and its obligations to individual employees in collective bargaining are created and defined by federal law. *See Steele*, 323 U.S. at 199-204. When Congress granted unions the exclusive authority to represent railroad and airline employees pursuant to Section 2, Ninth of the RLA, 45 U.S.C. §152, Ninth, it imposed a corresponding "statutory duty" to represent employees fairly in collective bargaining. *See Steele*, 323 U.S. at 202-03; *Rawson*, 495 U.S. at 372. In developing this federal duty of fair representation, the Court has consistently rejected the application of state law to union collective bargaining conduct in favor of a uniform federal standard of conduct, a uniform federal six-month statute of limitations, and a uniform federal standard for assessing damages. *See Vaca*, 386 U.S. at 190-95; *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 169 (1983); *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48-52 (1979).

Petitioners nonetheless claim that ALPA's collective bargaining conduct in this dispute – its statements concerning Fragmentation Policy, its internal bargaining policies and its subsequent implementation of its policies through collective bargaining – was governed by two independent and conflicting legal doctrines: the federal duty of fair representation (which provides a deferential standard of review, a six-month statute of limitations, and compensatory damages only) and the separate and conflicting common law obligations of several different states (which, according to the plaintiffs, provides a more intrusive legal standard, a longer statute of limitations and the availability of punitive damages). Even more, petitioners allege that ALPA's collective bargaining conduct

created state law "promises" or "contracts" that, in turn, *prohibited* ALPA from exercising its federal duty of fair representation to reconcile the competing interests of petitioners and other ALPA pilot groups in collective bargaining over seniority issues. (Pet. 13-14).

If adopted, this state law theory would permit employees to circumvent the substantive and procedural requirements of a federal duty of fair representation action by pleading every fair representation claim as a state law contract or tort action and would subject unions to a welter of conflicting state regulations whenever they conduct a strike or engage in collective bargaining.[8] So, too, state regulation of collective bargaining conduct at the behest of one employee group would prevent labor unions from satisfying their federal duty to consider the interests of *all* employee groups.

The lower courts have uniformly held that the federal duty of fair representation preempts such state law claims. Congress' intent to preempt state action may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and preemption is proper if state law "conflicts with federal law or would frustrate the federal scheme," *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 748-49 (1985), or if "the courts discern from the totality of the circumstances that Congress sought to occupy

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[8]While the plaintiffs do not say which state law governs their contract and tort claims, the alleged strike "promises" concern statements made in Virginia, the District of Columbia, Florida and Georgia (among other states); the 2,400 class members received these ALPA communications throughout the country; and the alleged tortious interference and breach of contract occurred in New York (Pan Am), Illinois (Midway), Pennsylvania and Virginia (USAir), and Georgia (Delta).

the field to the exclusion of the States." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 209 (1985). This Court has long preempted the application of state law to a wide range of collective bargaining activity because Congress intended to subject such conduct to a uniform system of *federal* law. *See, e.g., id.* at 208-13; *Lockridge*, 403 U.S. at 292.

In order to preserve the uniformity and supremacy of the federal labor law, *every* lower court to address this issue has also held that the duty of fair representation preempts state law claims such as petitioners' and that employees cannot circumvent the "purposefully limited" duty of fair representation, *see Rawson*, 495 U.S. at 374, by challenging union collective bargaining conduct under state law. *See, e.g., In re Glass Workers, Local No. 173*, 983 F.2d 725, 728-29 (6th Cir. 1993) (preempting state law malpractice, fraud and tortious interference claims); *Richardson* v. *United Steelworkers of Am.*, 864 F.2d 1162, 1169-70 (5th Cir.) (preempting state law misrepresentation claims where, as here, employees allegedly relied to their detriment on union "promises" during a strike), *cert. denied*, 493 U.S. 803 (1989); *Johnson* v. *United Food & Commercial Workers*, 828 F.2d 961, 967 (3d Cir. 1987) (fraud claims); *Peterson* v. *Kennedy*, 771 F.2d 1244, 1259-60 (9th Cir. 1985) (negligence and malpractice claims), *cert. denied*, 475 U.S. 1122 (1986); *Peterson* v. *Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1171 (4th Cir.) (preempting a common law tortious interference claim because "the potential conflict between remedies and administration [of state and federal law] are too great to permit the state law claims to stand"), *cert. denied*, 474 U.S. 946 (1985); *Griffin* v. *Air Line Pilots Ass'n, Int'l*, 126 Lab. Cas. (CCH) ¶10,913 (N.D. Ill. 1993) (tortious interference claims); *Rakestraw* v. *United Airlines, Inc.*, 765 F.Supp. 474, 495-96 (N.D. Ill. 1991), *aff'd in rel. part*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 286 (1993); *Eisenberg* v. *Trans World Airlines, Inc.*, 654 F.Supp. 125, 128

(S.D. Fla. 1987), *aff'd*, 875 F.2d 872 (11th Cir. 1989); *Reiss* v. *Brotherhood of Ry. and Airline Clerks*, 629 F.Supp. 1029, 1030 (E.D. Pa. 1986).[9]

Instead, the lower courts have consistently held that the type of union collective bargaining conduct at issue in this case – strike statements and the accommodation of competing employee interests in collective bargaining – must be measured against a uniform *federal* duty of fair representation standard derived from federal labor policy. *See, e.g.*, *Richardson*, 864 F.2d at 1169-70; *Peterson*, 759 F.2d at 1170-71. While the Petition fails to disclose this line of lower court authority, petitioners do not (and cannot) cite a single case in which a court has permitted employees to challenge the results of union collective bargaining decisions under state contract or tort law.[10] The district court's refusal to do so here

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[9]Contrary to the Petition (Pet. 9-10), the lower courts have properly held that the duty of fair representation preempts inconsistent state law even though the duty itself is implied from Section 2, Ninth of the RLA. *See, e.g.*, *Allis-Chalmers*, 471 U.S. at 210-12 (holding that the implied federal right of action under 29 U.S.C. §185 preempts state law contract claims). Similarly, while preemption in this case does not involve the primary jurisdiction of an administrative agency (Pet. 13 n.4), the federal interest in a uniform federal labor policy identified in the primary jurisdiction cases is equally applicable here. *Cf. id.* at 211-12.

[10]The cases cited in the Petition (Pet. 11 n.3) principally involve *federal* claims under Section 301 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §185, to enforce explicit provisions in a formal union constitution. The RLA contains no counterpart to Section 301 of the NLRA, *see Baylis* v. *Marriot Corp.*, 843 F.2d 658, 644 (2d Cir. 1988); moreover, the ALPA bargaining policies and strike communications at issue in this case are *not* contained in ALPA's Constitution or any other contractual instrument.

creates no reviewable issue.

Nothing in *Rawson* or *International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851 (1987), is to the contrary. In both cases, the Court held that state common law claims against unions must be preempted to ensure that unions are subject to uniform standards of conduct derived from federal labor law and that the plaintiffs could proceed, if at all, only under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185. *See Rawson*, 495 U.S. at 370-71. *Rawson* and *Hechler* thus concerned the relationship of two purely *federal* labor law claims: a federal duty of fair representation claim and a federal Section 301 claim to enforce a labor contract. *See id.*, 495 U.S. at 372. Neither case addressed the relationship between the federal duty of fair representation and state common law; neither considered the issues of supremacy and uniformity raised by petitioners' attempt to regulate ALPA's collective bargaining conduct under a series of conflicting state laws; and neither purported to overrule the lower court preemption cases described above. *See id.* at 384 (Kennedy, J., dissenting) (explaining that the duty of fair representation would preempt *state law* challenges to union conduct where, as here, the duty "address[es] the conduct in question").

As the district court explained, moreover, the contractual duty at issue in those cases – a duty to inspect the workplace for unsafe conditions assumed in a labor contract – is "sufficiently separate and distinct from the duty of fair representation so as not to interfere with implementation of that doctrine." (App. 59a). In this case, however, petitioners argue that ALPA must "honor" its "promises" to Eastern pilots by disregarding the interests of other pilot groups in collective bargaining with the carriers that acquired Eastern assets. These alleged state law duties thus pose a direct conflict with ALPA's federal duty to consider the interests of *all* pilot groups in negotiations with other carriers. (App. 58a-59a).

Nothing in *Rawson* indicates that the states can alter a union's duty of fair representation through such state law regulation or that a union changes the nature of its obligations simply by maintaining collective bargaining policies or by communicating collective bargaining goals to employees. *See id.* at 360-61; *Richardson*, 864 F.2d at 1167.[11]

In any event, review of the district court's preemption decision would serve no purpose in this litigation in light of the district court's summary judgment decision. Petitioners seek to litigate a state law breach of contract action against ALPA on theory that ALPA broke a "promise" to implement ALPA Fragmentation Policy to secure jobs with lateral seniority for Eastern pilots at other ALPA carriers. (Pet. 13-14). As the district court determined after reviewing the substantial record, however, the handful of ALPA strike communications cited by petitioners merely indicate that

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[11]In *Rawson* itself, moreover, the Court held that employees can assert contract claims against unions only if they can "point to language in the collective-bargaining agreement specifically indicating an intent to create obligations *enforceable against the union* by the individual employees." *Rawson*, 495 U.S. at 374 (emphasis added). Nothing in ALPA's policies or strike communications indicate that ALPA intended the Fragmentation Policy to grant Eastern pilots judicially enforceable rights against ALPA or to alter ALPA's duty of fair representation to other pilot groups. (App. 37a) (explaining that Fragmentation Policy "explicitly reserves" ALPA's discretion as collective bargaining representative in implementing the policy). So, too, no principle of law transforms a union's changing policies or statements concerning bargaining goals into immutable "contract" rights. *See Rakestraw*, 981 F.2d at 1536; *see also Clarke* v. *Laborers' Int'l Union*, 916 F.2d 1539, 1542 (11th Cir. 1990); *Air Wisconsin Pilots Protection Comm.* v. *Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991) (same).

ALPA would apply the procedural framework of Fragmentation Policy to the sale of Eastern assets, and that is precisely what ALPA did. (App. 42a). The district court also determined that ALPA reasonably interpreted and complied with ALPA Fragmentation Policy in all respects throughout this dispute. (App. 36a, 41a). This dispositive factual determination precludes any "breach of contract" claim against ALPA and does not raise any issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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